IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 65.

THE UNITED STATES, *Petitioner*,

v.

CALLAHAN WALKER CONSTRUCTION COMPANY, *Respondent*.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT.

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INDEX

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STATEMENT.

Before the contract involved herein was executed the petitioner had drawn up a set of "standard specifications of levee work" for flood control of the Mississippi River and tributaries (R. pp. 79 *et seq.*); and under such standard specifications bids were invited for the construction work to be done under an appropriation therefor. The petitioner also prepared drawings which accompanied such standard specifications; and it was upon the provisions of

such specifications and the drawings accompanying the same that the respondent submitted its bid, subsequently received a contract for the construction of the "Lake Lee Setback Levee" and acquired the kind of equipment suitable for the work as laid out (R. p. 61).

The standard specifications for levee work and the drawings in pursuance thereof are made a part of the contract of August 27, 1931 (R. p. 61); and on August 17, 1931, the contractor gave the contracting officer a description of the kind of equipment to be used (R. p. 5).

The Lake Lee Setback Levee is divided into four items designated 495L-A; 495L-B; 495L-C and 495L-D (R. p. 95); and it is with reference to Item 495L-A of the "Lake Lee Setback Levee" that this suit arises.

The specifications provide that,—

> Where, in any section *and before* the levee has been completed to grade and section, settlement of foundation develops to such extent as to make it inadvisable in the opinion of the contracting officer to continue to add material, and advisable in his opinion to postpone to a considerably later date all attempts to complete this portion of the levee to grade and section, he shall have the right to omit further work on this section, and to accept it as completed, after it has been dressed and sodded. (See paragraph 30.) (R. p. 91)

There is no dispute about there occurring a foundation settlement or failure on Item 495L-A between Stations or Sections 5113 and 5146 of such a pronounced character that the levee designed for such space would not stand up until buttressed by large riverside and landside false berms (R. p. 35); and that at the time said foundation settlement occurred construction work between Stations 5123 and 5113 was approximately 65 per cent to 75 per cent completed (R. p. 35).

Acting under the provisions of paragraph 28 of the specifications (R. pp. 90-91) the contracting officer deemed it inadvisable to continue to add material to the levee between Stations 5113 and 5146, because of the pronounced founda-

tion settlement; and on or about October 7, 1932, verbally ordered all work between Stations 5113 and 5123 stopped (R. p. 36).

The proof shows positively that the contracting officer decided on October 7th, that Stations 5113 and 5123 were within the area of foundation settlement of Item A; and that those Stations (as well as all Stations back to Station 5146 could not be completed under the contract (R. pp. 6-7).

On or about October 13, 1932, the contracting officer decided that riverside and landside false berms should be constructed between Stations 5113 and 5146 in order to complete the levee and began to let bids for the rental of equipment to build such false berms under the "force account" of the Government Engineers (R. pp. 6, 49).

On or about October 13, 1932, the contractor had substantially completed the contract of August 27, 1931, by a construction of the levee from Station 5113 to the end of Item A and was preparing to move off, but it was invited by the contracting officer to enter into negotiation with his office for a new contract, or a modification of the contract of August 27, 1931 (as provided by Articles 3 and 4 thereof) to build or permit the building of false berms between Stations 5113 and 5123 in order to complete the topping out of the levee at those Stations which were from 65 per cent to 75 per cent completed when foundation settlement occurred at Station 5123 and construction work stopped on October 7th (R. p. 49).

The contractor was willing to negotiate with the contracting officer for a modification of the contract of August 27, 1931, or a new contract to build or permit the building of added false berms between Stations 5113 and 5123 and top off the levee, provided it be paid a *fair* and *equitable* rental value for its equipment to be used in such construction so as to cover the *actual cost* of such work, plus 15 per cent for supervision (R. p. 58). The contractor knew from its experience, and the conditions prevailing at the place of work showed, that a *fair* and *equitable* standard

of the value of such particular work was not the over-all unit price of 14.43c per cubic yard, specified in the original contract (R. pp. 59-61); and it pointed out to the contracting officer why the original contract price of 14.43c was not a fair and equitable standard to cover the actual cost of work incident to building the added false berms (R. pp. 49-59). The contracting officer admittedly realized the contractor was correct, and proposed to and did build the landslide false berm between Stations 5113 and 5123 at actual cost to the Government under his "force account" (R. p. 49).

Negotiations for the construction of the added false berms between Stations 5113 and 5123 which the contracting officer opened up with the contractor and others (on or about October 13, 1932) for completion of the levee in Item A (after the stop order of October 7, 1932 (R. p. 49)) were carried on under the provisions of Paragraph 28 of the specifications (R. p. 91), and Articles 3 and 4 of the contract (R. p. 64).

The proposition submitted by the contracting officer to the contractor was not only in pursuance of a "change order" as provided in Paragraph 14 of the specifications, but took into consideration the provisions of Paragraph 28 of the specifications that the work of adding false berms, and the placing of additional material in the Levee proper, devolved upon the Government (R. pp. 6 and 7). The first suggestion of the contracting officer was that the Government (having taken the Levee over between Stations 5113 and 5146 (R. pp. 6 and 7)) would build the riverside and landside false berms between Stations 5113 and 5123 and the contractor should stand by with its "tower machine" to top out the Levee between those Stations (R. pp. 49, 54 and 91). The contractor could not afford to let its equipment remain idle (R. p. 54) while the false berms between Stations 5113 and 5123 were being constructed by the Government under its "force account" (R. pp. 49-54); and the alternative proposition submitted by the contracting officer

was that he let bids for the rental of equipment to build the landside false berm between Stations 5113 and 5123 and that the contractor undertake the work of building the riverside false berm and top out the Levee at the contract price of 14.43c per cubic yard (R. p. 49). The contractor notified the contracting officer that the riverside false berm could not be constructed at the price of 14.43c per cubic yard as the *standard of actual cost to it; that it had lost money at that price* under the original contract for the work done between Stations 5113 and 5123 (R. p. 59); and that the only way it could afford to build the riverside false berm between Stations 5113 and 5123 was *actual cost* of the work to it plus 15 per cent of such cost for supervision (R. p. 58). That the contract required such an *"equitable adjustment"* of the cost for the added work (R. pp. 49, 64-5). That the added work was outside the contract unless it was modified as provided by Articles 3 and 4 (R. pp. 64 and 65).

There was no *change* made in the *original Levee* designed under Paragraph 39.2 of the specifications for Stations 5113 and 5123, and covered by the contract of August 27, 1931 (R. pp. 48, 95); and the order of the contracting officer (issued verbally on October 14, 1932 through his Area Engineer, and later confirmed by letter of October 18, 1932) that false berms be added and the contractor build the riverside false berm "at contract price per cubic yard", was not alone based upon a *modification* of the *specifications* as provided by Paragraph 14 of the specifications (R. pp. 48-50); but was also based upon a *change* made in the contract as provided by Article 4 thereof, which required an *"equitable adjustment* of the cost" as provided by Article 3 (R. pp. 70-71).

The Area Engineer of petitioner testified as follows:

> Q. 25. Did the work of building the false berm *necessitate a redesign of the levee?*
>
> A. *It did not.* The same section of levee was used between those Stations as had been used elsewhere and was designed for that *particular section.* (R. p. 48) We did not desire to *change the contract at all, and made no attempt to.* (R. p. 50)

XQ. 197. What would you say with reference to the false berm, both landside and riverside being *additional construction* of that item? (R. p. 49)

A. Yes, sir, it reinforced the foundation of that item.

XQ. 198. It was additional construction, then, wasn't it?

A. *It was reinforcement of the foundation that wasn't in the original specification* (R. p. 50).

The contracting officer testified as follows:

Q. 11. You ordered the berm constructed by Callahan-Walker Company?

A. I did.

Q. 12. Pursuant to what *section of the contract did you give that order?*

A. Pursuant to Paragraph 14 of the specifications (R. p. 27).

* * * *

The contractor, asserting its legal rights under Paragraphs 3 and 4 of the contract, refused to make a new contract with the contracting officer to build the false berms between Stations 5113 and 5123 *at the price of 14.43c per cubic yard* because that price was not the proper standard of value for the work, and was not an "equitable adjustment" under Article 3 of the contract (R. pp. 44-58-59); but did agree to build the riverside false berm at *actual cost* as an "equitable adjustment" (R. p. 58). The Area Engineer arbitrarily gave the contractor verbal direction on October 14, 1932 to build the riverside false berm, with full knowledge that no price had been agreed upon as the standard of value for the work or as an "equitable adjustment" under Article 3 of the contract (R. p. 50); and the contracting officer advised the contractor to keep the accurate time on the various pieces of equipment used in the work so there *would be no dispute* as to the standard of value therefor, or the *actual cost* of doing the added work (R. pp. 47-48). There is no dispute over the quantity of material added in the false berm (R. p. 50), as to the rental value of the contractor's equipment, or as to the time such equipment was employed in the work (R. p. 11).

The contracting officer, in pursuance of the stop order of October 7th, subsequently put out bids for the rental of equipment to build a landside false berm between Stations 5113 and 5123 (R. p. 49); but undertook to construe the contract of August 27, 1931 as *conferring upon him authority to verbally* order the contractor to build the riverside berm at the "contract price per cubic yard" as the standard of value for such work (R. p. 50). The verbal order of October 14, 1932, with reference to a change in the specifications by the addition of false berms, was confirmed in writing on October 18, 1932 (R. pp. 6 and 7). At the time the verbal order was given the contractor to proceed with the construction of the "added riverside" false berm, it was handed a sketch of the dimension of same as a change of Section 39.2 of the specifications (R. pp. 44, 95), and when the letter of October 18th was issued the contractor had been working four days on the job with the knowledge and consent of the contracting officer (R. pp. 47-8). Also, with the implied understanding that the contractor would be paid the *actual cost* of such added construction, plus 10 per cent or 15 per cent of such cost for supervision (R. pp. 47-8).

Shortly after the work of building the riverside false berm between Stations 5113 and 5123 was completed, a statement of the cost thereof was submitted by the contractor (R. pp. 45-10-11); and the amount of such cost, over and above a credit of $6,622.65 paid at the unit rate of 14.43c *has not been paid* (R. p. 11). The facts which are made the basis of the *statement of cost* submitted by the contractor after the added work was completed, *are not now, and never have been in dispute* (R. p. 11).

On October 18th the contracting officer issued a written change order under the provisions of Paragraph 28 of the specifications and Article 4 of the contract as follows:

> In reference to recent subsidence which occurred on your Lake Lee Setback, Item A, this will confirm instructions issued to you by the Central Area Engineer

relative to the completion of your contract, as follows:
(a) A riverside false berm will be constructed from station 5113 to station 5123 having a riverside crown elevation of 120 ft. M. G. L. at a distance of 250 feet from centerline and sloping upward toward the levee on a 1 on 18 slope and downward to the ground surface on a slope of 1 on 6.

(b) *The above berm shall be completed before doing any further work between stations 5113 and 5123.*

(c) You will be given credit for 100% of the embankment south of station 5123.

(d) If and when directed by the contracting officer, the levee between stations 5123 and 5146 shall be sodded.

(e) Payment for additional yardage made necessary by the above instructions will be made at contract price per cubic yard. (R. pp. 6-7)

ARGUMENT.

The Court of Claims holds that the questions involved in this suit are purely questions of law; and deal only with the standard of value and the conduct of the contracting officer that Articles 3 and 4 of the contract prescribe, as a matter of law, for work not provided for in the specifications of the contract, but added by a change made in such specifications.

The standard of value for the construction of riverside and landside false berms between Stations 5113 and 5123 was not less than the *actual cost*, plus a reasonable percentage of such cost for supervision; and nothing short of such a payment for the work of building the false berms would be "fair and equitable" as a matter of law under the provisions of Articles 3 and 4 of the contract of August 27, 1931.

Article 4 of the contract provides that where any *change is made in the drawings and/or specifications*, the *cost* incident to such change shall be *adjusted* as provided in Article 3 of the contract (R. p. 65). The "added" false berms between Stations 5113 and 5123 were not required as additional yardage in the Levee "by reason of foundation set-

tlement" for which the standard of value is the contract price as provided by the first and second subsections of Section 28 of the specifications (R. pp. 50 and 90), but were required because of "latent conditions at the site materially different from those shown on the drawings or indicated in the specifications" (R. pp. 6 and 7 and 40-95).

The contractor could not be *refused payment* at 14.43c per cubic yard for any and all material placed in the Levee proper, it being substantially 65 per cent to 75 per cent complete on October 7, 1932, and the fact that such an amount has been paid under the contract for the material placed in the "added false berms" between Stations 5113 and 5123 (for which credit is given on the claim herein (R. p. 10)) is in no sense an "equitable adjustment" of the *actual cost* incident to the building of the *added riverside false berm* (R. p. 10).

The Court of Claims makes the following finding of fact with respect to the *actual cost* to the contractor, based upon the time required and rental value of the equipment used for the construction of the added riverside false berm, viz:

> This claim has not been paid in whole or in part.
>
> There is no dispute between the parties as to the time required by the subcontractor for doing the work described in Item A and Item D of this bill and the evidence shows that the price stated as the value of the use of the equipment and the work done by it as shown in these two items was reasonable and fair. The Monaghan dragline used was of more than usual capacity. (R. p. 11)

The additions made necessary by the change order increased the amount due under the contract by $500 or more (R. p. 10); and since there is no disputed question of fact over the amount due for the extra work as an "equitable adjustment" of the contract, which the parties agreed to as the standard of payment for such extra work in the event of a change in the specifications, the conduct of the contracting officer in refusing to make an "equitable adjustment" is

contrary to the standard prescribed by the contract (see Articles 3 and 4, R. pp. 64-65).

The powers of the contracting officer were defined by the contract (see Articles 3 and 4, R. pp. 64 and 65), and definition is limitation. Whether the contracting officer applied the contract standard validly set up; whether he acted within the authority conferred or goes beyond it; whether his conduct satisfied the pertinent demands of due process; and, whether he put his mind on the subject of an "equitable adjustment" to cover the "increase" or "decrease" (if any) in the cost of work made necessary by the change ordered, are purely questions of law and exclusively questions for judicial decision (see *Federal Radio Commission* v. *Nelson Brothers B. & M. Co.*, 289 U. S. 276-278 (78 L. Ed. 1173-4).

Therefore, inasmuch as there is no dispute of fact or contradictory evidence as to the time required to perform the extra work or the fair rental value of the equipment used in connection therewith as a basis of its actual cost, the point that full payment should be made for such extra work is ruled as a question of law (see *Upton* v. *Tribilcock*, 91 U. S. 203 (23 L. Ed. 203)). Furthermore, since the contracting officer failed to observe or follow the *standard of conduct* prescribed for him in the contract with reference to making an "equitable adjustment" to cover the cost of the extra work ordered (and "modify the contract in writing accordingly"), that point is also ruled as a matter of law (see *Chicago, Rock Island & Pacific Railway Company* v. *Cole*, 251 U. S. 54 (64 L. Ed. 113)).

The contract was modified by the verbal order of the contracting officer of October 14, 1932 that riverside and landside false berms be added to Sections 5113 and 5123, afterwards confirmed by the letter of October 18, 1932 (R. pp. 6 and 7); and inasmuch as there is not now, and never has been, any dispute of fact over the amount of the *actual cost* incident to the construction of the added riverside false berm under such "modification" (the landside false berm

between those Stations being built by the Government), the balance of the cost due for such work is legally payable under the contract. There is no *dispute over* the amount found by the Court of Claims to be *legally due* under the contract (R. p. 11).

The position of petitioner is that the contracting officer had a legal right to construe the contract, and hold as a matter of law that the added false berms between Stations 5113 and 5123 be constructed at the "original contract price". However, it concedes that there is no disputed fact question with reference to the actual cost of such extra work or the amount legally due the respondent under the terms of the contract, as construed by the Court of Claims (R. p. 11).

The petitioner also insists that the contracting officer fixed the contract unit price of 14.43c per cubic yard, as the standard of "payment for additional yardage made necessary under the change order" because he *thought* there was sufficient suitable material within the reach of the special equipment of the contractor, and for that reason he *concluded* as a matter of law that no "equitable adjustment" to cover the *added cost* of building a riverside false berm (much larger than the one originally specified at Stations 5116 and 5119) and at Stations 5113 to 5116 and 5119 to 5123 where no false berm had been provided for in the original specifications (R. pp. 6, 7, 27, 50 and 95) *was required under the contract*. Pitted against the conduct by the contracting officer in assuming that there may have been sufficient suitable material within the reach of the equipment of the contractor (by using as a part of such equipment the tractors and wagons of a third party), the proof shows that he failed completely to put his mind on the subject of whether the added false berms would cost more or less than the "contract price". The contract required, as a matter of law, a determination of the *actual cost* at which the added riverside false berm between Stations 5113 and 5123 could be constructed; and the Court of Claims holds that because the contracting officer merely expressed a "conclusion of law" at the close of his written "change order" that "payment

for additional yardage made necessary by the above instructions will be made at contract price per cubic yard", he breached Article 3 of the contract (R. pp. 12 and 17).

There is not one word of proof in the record that the contract price of 14.43c per cubic yard would be *fair, reasonable,* or *equitable* to cover "the increase in *cost*" made necessary by the added false berms at Stations 5113 and 5123 (see Article 4 of the contract, R. pp. 64 and 65); and on the other hand, there is positive and uncontradicted proof that the contract price of 14.43c per cubic yard did not cover the *actual cost* of 65 per cent or 75 per cent of the material already put into Stations 5113 and 5123 up to the time when the stop order was issued on October 7, 1932, and the subsequent "change order" promulgated October 18, 1932 (R. p. 59).

The position of the petitioner is that Articles 3 and 4 of the contract of August 27, 1931, properly construed, do not require an "equitable adjustment" increasing the "unit contract price" so as to make the amount which the contractor is entitled to receive for the added work "fair and reasonable"; or that such an amount be arrived at by the application of a proper standard which the contracting officer refused to adopt. That the contracting officer could breach Article 3 of the contract with immunity, no matter how imprudent his act or conduct may be; and that the only remedy of the contractor was the circuitous proceeding of appealing a "question of law" to the head of the department.

A majority of the Court below holds that there being no dispute of fact, the case turns upon a question of law. Judge Green and the Chief Justice are content to hold that the contracting officer breached Article 3 of the contract by his conduct and refusal to put his mind on the *subject* of *cost* of the "added construction" and fix an "equitable amount" to be paid therefor in view of a *modification* made in the specifications (see *Callahan Construction Company* v. *United States*, 91 Court of Claims 538, 611). They also say in the opinion that the term "equitable adjustment" as a

standard, when required under the contract and refused or ignored by the contracting officer, presents a question of law (see *Case* v. *Los Angeles Lumber Company*, 308 U. S. 106, and *Securities Commission* v. *U. S. Realty Company*, 310 U. S. 434).

Judge Whitaker, in his concurring opinion with the majority, takes issue with the minority opinion, that the refusal or failure of the contracting officer to make an "equitable adjustment" to cover the cost of added work presents a *disputed question of fact*. Judge Whitaker says:

> There is no dispute between the parties in this case as to the facts. The only dispute concerns whether or not the amount allowed by the contracting officer for the extra work constituted an equitable adjustment, and this, as the majority opinion holds, is a question of law. Neither the contracting officer nor the head of the department was given any right by the contract to decide such questions. If, therefore, the plaintiff did not think the adjustment made by the contracting officer was equitable, it had a right to appeal to this court for relief. The relief granted by the court is the relief to which I think the plaintiff is entitled.

Judge Whitaker is also of the opinion that the question of what constitutes an "equitable adjustment" as provided by Article 3 of the contract as a standard of value is "clearly a question of law" under the authority of *Case* v. *Los Angeles Lumber Company, supra.*

The minority of the Court below (Judges Madden and Jones) are of the opinion that even though the "dispute" is a question of law, the provision of Article 15 of the contract with respect to "all disputes concerning *questions of fact*" • • • being appealable to the head of the department,—prevents the Court from taking jurisdiction of the case. They say that the contractor should have appealed to the head of the department for a proper *construction of the contract*, and upon failure of relief there, commence its suit in the Court of Claims (R. p. 20).

The minority of the Court undertakes to construe the contract as giving the contracting officer the authority to pass upon questions of law, and so as to make the head of the department the *final judge* of all such questions of law. It is quite evident that the contract should not be so construed (see *Callahan Construction Company* v. *United States*, 91 Ct. Cls. 538).

The minority of the Court concedes that the contracting officer did not make an "equitable adjustment" to cover the *actual cost* of the added work as required by the contract, but says that because the subcontractor of the contractor had agreed with the contractor to put in some of the "original material" at Stations 5113 and 5123 at 16c per cubic yard (R. p. 59), that the contracting officer was near enough to being right when he specified the contract price of 14.43c per cubic yard as the standard for an "equitable adjustment". This is merely the decision of a question of law upon a different view from that expressed by the majority. The testimony of the "subcontractor" (whom the petitioner called as a witness) was that he *lost money* at 16c per cubic yard for the original material put in the levee between Stations 5113 and 5123; but such testimony is not preserved in the record here.

The terms "fair" and "equitable" are words of art no matter when or how used; and when not properly applied to a given situation, a question of law is presented. The case of *Case* v. *Los Angeles Lumber Company*, *supra*, is directly in point in this case.

Therefore, inasmuch as the contracting officer refused to pay a "fair" and "equitable" price for the added work demanded by him under the contract, he breached its terms (R. p. 12). The breach being admitted, the amount sued for is due the contractor under Article 3 of the contract as a matter of law. The contracting officer had no right to assume or conclude, as a matter of law, that the contract price of 14.43c per cubic yard was "equitable" and "fair" for added work ordered; and his apparent failure to put

his mind on the subject with respect to the added *cost*, his decision (if any) was not upon a disputed fact.

The Court of Claims makes findings of fact which show that the contracting officer misinterpreted his authority under the contract with respect to making an "equitable adjustment" for the cost of added work that was fair and reasonable; and holds that under the express terms of the contract the amount of such cost (less the amount credited thereon at the "contract price") is payable to the respondent as a matter of law.

The full Court below holds that the contractor fully complied with the "ten day" clause of Article 3 of the contract (R. p. 20), when it orally and personally protested to the contracting officer (while they were personally discussing the change made necessary by foundation settlement) that the "contract price per cubic yard" would not adequately cover the *increased cost* of placing the added material in a false berm; and that an "equitable adjustment" of such increased cost should be made and the contract modified accordingly in writing (R. p. 64).

It must be conceded that the actual increase in the cost made necessary by changes in the specifications could not be determined adequately and equitably until the added work was completed; and that the conclusion of the contracting officer that no bids for the work would be let, and only the "contract price per cubic yard" would be paid for the added work, is in no sense an "equitable adjustment" (R. pp. 49 and 50).

The change in specifications (Section 39.2, p. 95) was of such a nature that produced a modification of the contract; and since there is an express provision in Article 4 of the contract that *any increase in cost* incident to a change in the specification shall be paid under an equitable adjustment as provided for in Article 3, the refusal of the contracting officer to pay the actual cost of so much of the added work between Stations 5113 and 5123 which he *ordered the contractor to perform* was a breach of Article 3 of the contract (R. pp. 6 and 7).

The provisions of Article 3 of the contract that an "equitable adjustment" be made to cover the cost of added work was made *with contractual intent*, and the terms "equitable adjustment" are not purely illusory. The petitioner is bound in *good faith* to pay the contractor the *actual cost* of what it got and accepted; and there being no dispute over the amount of such cost not yet paid (R. p. 11) the petitioner is liable therefor as a matter of law. (See *Corthell* v. *Summit Thread Co.*, 132 Me. 94, 167 Atl. 79; *Henderson Bridge Co.* v. *McGrath*, 134 U. S. 260 (33 L. Ed. 934).)

The contract negatives the thought that "the contract price per cubic yard" shall be the standard of value for added work in that the cost of such added work might be less or more than such standard; nevertheless, when the contract makes no statement of the price to be paid for the added work (other than it shall be "equitable and fair"), and the contracting officer refuses to comply with the terms of the contract, the law invokes the standard of pay that is *equitable and just*. (See *United States* v. *Smith*, 256 U. S. 16; *Rust Engineering Co.*, 86 Ct. Cls. 461; *United States* v. *Spearin*, 248 U. S. 132; and *Kellog Bridge Co.* v. *Hamilton*, 110 U. S. 108.)

None of the voluminous cases cited by the petitioner are contrary to the sound principle of law announced by the Court of Claims in this case, and the case of *Case* v. *Los Angeles Lumber Company, supra*, is the only precedent needed to support such principle.

The position of the petitioner, when stripped of its verbiage, is that its solemn agreement (made with contractual intent) to pay an "equitable amount" for extra work added to a contract may be ignored as a matter of law; and the injured party has no standing in Court. That although the petitioner has received, accepted and retains a substantial benefit for work and labor done; the party whom it contracted with and "ordered" to do the work, supply the equipment and supervise the construction should not be paid because he has not yet met his obligation to a third

party for the *fair rental* value of some of the equipment used (R. p. 17).

Such an argument merely magnifies the legal misconduct of the contracting officer in refusing to make an "equitable adjustment" and since the Court of Claims has adequately disposed of the point of law underlying such position, the matter does not need further discussion (R. p. 17).

Respectfully,

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